

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Applications for the Consent to Transfer)	
of the Control of Licenses and Section 214)	CS Docket No. 00-30
Authorizations by Time Warner, Inc. and)	
American Online, Inc., Transferors, to)	
AOL Time Warner, Inc., Transferee)	

REPLY COMMENTS OF MCI

MCI submits these reply comments in support of the Petition filed by AOL Time Warner, Inc. for removal of the merger condition restricting its ability to offer Internet users streaming video enhanced Instant Messaging-based high-speed services (“AIHS”) via AOL Time Warner broadband facilities (the “AIHS Condition”).¹

In short, the Commission’s AIHS Condition prohibited AOL Time Warner from offering an advanced Instant Messaging-based high speed service such as video streaming over Instant Messaging (IM) until it grants access to its service to at least one of its Instant Messaging competitors, either via contract or a public standard. Alternatively, the Commission agreed to lift the AIHS Condition once AOL Time Warner presented clear and convincing evidence that it is no longer dominant in the Instant Messaging market.²

¹ AOL Time Warner, Inc., Petition for Relief, CS Docket No. 00-30, filed April 2, 2003 (“AOL-TW Petition”); See Public Notice, “AOL Time Warner Inc. Submits Petition for Relief from Instant Messaging Interoperability Requirements,” DA 03-1092 (April 4, 2003).

² *Applications for the Consent to Transfer of the Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Inc., Transferors, to AOL Time*

The Commission's continued imposition of the AIHS Condition as necessary in the public interest is not supported by the record to-date. Nor is the imposition of the AIHS Condition justified by Commission precedent. For nearly thirty years, the Commission had declined to attempt to regulate the Internet and information services such as IM. Finally, the Act provides no jurisdictional basis to sustain the imposition of the AIHS Condition.

I. The Record Does Not Support the Continued Imposition of the AIHS Condition

The record in this proceeding contains insufficient evidence to support the conclusion that the continued imposition of the AIHS Condition is necessary in the public interest. The comments filed by Faulhaber and Faber represent the sole substantive comments filed in response to the AOL-TW Petition.³ In their comments, Faulhaber and Faber state that the conditions in the IM market that led to the Commission's imposition of the AIHS Condition have changed since the adoption of the AOL-TW Merger Order.⁴ They admit that there are two stable competitors -- Microsoft and Yahoo! -- to AOL Time Warner in the IM market today, and consequently, the threat of market tipping is less an issue today than at the time of the merger.⁵ Another changed condition cited by Faulhaber and Faber is the availability of multi-IM clients, such as Trillian.⁶ Desktop applications developed by Trillain makes interoperability less

Warner, Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001) ("AOL-TW Merger Order").

³ The only other set of comments that were filed in response to the AOL-TW Petition provide no evidence to support continued imposition of the AIHS Condition, and in fact, urge the Commission to remove the restriction. See Comments of Dana-Renee Lee, CS Docket No. 00-30, filed April 7, 2003.

⁴ Comments of Faulhaber and Farber, CS Docket No. 00-30, filed May 7, 2003, at p. 5.

⁵ *Id.* at pp. 2-3.

⁶ *Id.* at p. 3.

important today than it was at the time of the merger, thus providing another reason for eliminating the AIHS condition.⁷

In addition, as a condition to the merger, the Commission required that AOL Time Warner report regularly on the actions it has taken to achieve interoperability of its IM offerings and others' offerings.⁸ AOL has made four such reporting submissions. Other than the concerns raised by Faulhaber and Faber in their response to the AOL-TW Petition, no other public comment has been received with respect to any of these submissions.

II. The Imposition of the AIHS Condition is Not Justified by Commission Precedent

In MCI's view, the Commission was not justified legally in imposing the AIHS Condition in the first place. Instant Messaging is an information service, not a telecommunications service. As such, IM should not be subject to FCC regulation, oversight, or enforcement. The Commission should take this opportunity to reaffirm the unregulated status of IM and other information services and lift the AIHS Condition.

With regard to information services, the Commission has carefully drawn a fundamental distinction between communications services that it defined as "basic" or "telecommunication services" and "enhanced" or "information services."⁹ The distinction was made to avoid unnecessary and counterproductive regulation of competitive information services, while regulating as common carriage the basic telecommunications services provided by telecommunications carriers.

⁷ *Id.*

⁸ See AOL-TW Merger Order at ¶ 197, 327.

⁹ See *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, 428-40 (1980) ("Computer II").

The crucial regulatory distinction, and now legal standard in the Telecommunications Act of 1996, is the basis for an unbroken string of public pronouncements by Commissioners that the Commission cannot, does not, and will not “regulate the Internet.”¹⁰ As early as the *First Computer Inquiry*, the Commission declined to subject computer data processing service providers to common carrier regulation.¹¹ More recently, in his dissent to the AOL-Time Warner Order, then-Commissioner Powell chastised the Majority's apparent foray into regulating the Internet, a move he said ignored the Commission's past practice of not regulating most computer-related information services for fear it would undermine innovation.¹² Although Powell voted in favor of allowing the AOL-TW merger to go forward, he objected to the imposition of merger conditions.

In his dissent, Powell distinguished instant messaging, which he called a “software application born purely of the mother Internet,” from “telecommunications infrastructure, like cable or DSL, that affect Internet transmission.”¹³ With regard to the instant messaging interconnection condition, Powell chastised the Majority for imposing a regulatory mandate on

¹⁰ See, e.g., Remarks of William E. Kennard, Chairman, Federal Communications Commission Before the Summer 2000 Session of the National Association of Regulatory Utility Commissioners (July 24, 2000) (“[p]erhaps the FCC's most important decision—we decided to leave the Internet unregulated”); Remarks of Chairman Kennard Before the National Press Club, *Telecommunications @ the Millennium: The Telecom Act At Four* (Feb. 8, 2000) (“The Commission wisely withheld regulation of most advanced services.”); Remarks of Susan Ness, Commissioner, Federal Communications Commission Before the IRTS, *The Net Effects on Communications Policy (or how the Internet and Convergence are Revamping Regulatory Regimes)* (June 7, 2000) (in reference to technological developments, “[t]he FCC's policies of fostering competition, while taking a hands-off approach to the Internet and information services, have facilitated many of these changes”).

¹¹ *First Computer Inquiry*, Tentative Decision, 28 F.C.C. 2d at ¶ 18 (1970).

¹² Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, AOL-TW Merger Order at pp. 11-13 (“Powell Dissent”).

¹³ Press Statement of Commissioner Michael Powell on the Approval of AOL-Time Warner Merger at p. 2 (“Powell Press Statement”).

“a hypothesized product and a hypothesized market” based on “its own sweeping technical conclusion that [instant messaging] is an essential facility for nearly all future real time, interactive Internet communications.”¹⁴ He criticized the Majority for embracing the position that “the FCC has jurisdiction to regulate virtually every Internet product or service that facilitates communications,” this despite the fact that under the Computer II regime, the Commission “has expressly declined to regulate similar computer, data processing and information services for the very reason that such interference would undermine the energy and drive toward innovation that characterizes these highly competitive markets.”¹⁵

III. The Act Provides No Jurisdictional Basis to Sustain the Imposition of the AIHS Condition

The Commission’s public interest authority does not justify regulation of IM. In fact, it would be antithetical to the public interest to continue to impose common carrier-type regulation on information services such as AIHS.

Moreover, the Telecommunications Act of 1996 makes it clear that the Commission has no authority to regulate Internet-based services such as IM. Section 230(b)(2) of the Telecom Act prohibits Federal and State regulation of the Internet and other interactive computer services like AIHS.¹⁶ Thus, the Commission erred in imposing common carrier-type regulation on this non-Title II service.

¹⁴ Powell Press Statement at p. 1.

¹⁵ *Id.* at pp. 1-2.

¹⁶ 47 U.S.C. § 230(b)(2).

IV. Conclusion

For the reasons discussed above, the Commission should grant AOL's Petition for Relief.

Sincerely,

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May 20, 2003